language" of the statute: "[t]he statute states that the 'action or proceeding . . . shall be removed'. 28 U.S.C. § 2679(d)(2). It does not speak of claims or federally linked defendants; it speaks of the entire action.") (footnotes omitted).

Despite the clear statutory language in this respect, a number of courts appear simply to have assumed that it is appropriate to conduct a claim-by-claim analysis and have failed to apply SLUSA's language mandating removal and preemption of actions as a whole. Indeed, one district court in 2003 stated that a Ninth Circuit decision, *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1131 (9th Cir. 2002), which did not address the issue discussed herein, "is illustrative of the uniform approach taken by the courts in segregating claims that are preempted by SLUSA from pure state law claims that are not, thus rejecting [defendant's] argument that SLUSA applies to 'actions' and not to claims." *Cape Ann Investors LLC v. Lepone*, 296 F. Supp. 2d 4, 13 n.7 (D. Mass. 2003).[5]

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5. For other cases in which courts conducted a claim-by-claim analysis, *see, e.g., Professional Management Associates, Inc. v. KPMG LLP*, 335 F.3d 800 (8th Cir. 2003) (assuming without discussion that claim-by-claim analysis applies); *Gray v. Seaboard Secs., Inc.*, 241 F. Supp. 2d 213, 219-22 (N.D.N.Y. 2003) (court determined SLUSA preemption as to each claim), *rev'd*, 126 Fed. Appx. 14 (2d Cir. 2005) (affirming the claim-by-claim approach but reversing on other grounds); *Vohs v. Miller*, 323 F. Supp. 2d 965, 973-74 (D. Minn. 2004) (plaintiff's complaint alleged both federal claims and state law claims for fraudulent misrepresentation and civil conspiracy; the court determined SLUSA preemption separately as to plaintiff's state law claims). *But cf. Miller v. Nationwide Life Insurance Co.*, 391 F.3d 698, 702 n.2 (5th Cir. 2004) (The court noted that the defendant "suggests that these [preemption-triggering] allegations, made within the overall complaint, but outside the state

(Cont'd)

In this case, the Second Circuit acknowledged the relevant statutory language. It recognized that:

> SLUSA prohibits the "maint[enance] in any State or Federal court" of any "covered class action" alleging fraud in the purchase or sale of a covered security under state law, 15 U.S.C. § 78bb(f)(1), and defines a "covered class action" as a "single lawsuit" or "group of lawsuits" brought on behalf of more than fifty persons and meeting other specified criteria, 15 U.S.C. § 78bb(f)(5)(B). These provisions might be read to suggest that where a single complaint contains claims that include allegations triggering preemption and other claims that do not, SLUSA prohibits maintenance of the entire action.

Dabit, 395 F.3d at 47.

This understanding of the language of the statute is clearly correct, but the Second Circuit declined to apply the statute literally. *Dabit*, 395 F.3d at 47. The Second Circuit provided three reasons for doing so, none of which warrant deviating from the natural meaning of the statutory text.

The court first observed that "the historic police powers of the states are not to be preempted unless it was Congress's 'clear and manifest purpose' to do so." *Dabit*, 395 F.3d at 47, *quoting City of Milwaukee v. Illinois*, 451 U.S. 304, 316

(Cont'd)

law claim, are sufficient to require dismissal under SLUSA." It declined to decide the issue because plaintiff's "state law claim itself contains allegations of misrepresentation and/or omissions.").

(1981). Here, however, there is only one plausible reading of the statute at issue – indeed, the court below did not articulate *any* alternative interpretation of SLUSA's text – and Congress's purpose therefore is "clear and manifest." *See Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788, 1801 (2005).[6]

The Second Circuit next indicated that it would refuse to interpret the text of SLUSA in accordance with its ordinary meaning because to do so would, in that court's view, mean that SLUSA is "an imprecise instrument." *Dabit*, 395 F.3d at 47. The relevance of the Second Circuit's statement in this regard is unclear. Statutes must be applied in accordance with their terms whether or not they are "imprecise instruments." Indeed, statutes often cover situations other than those that may have primarily motivated their drafters. *See Brogan v. United States*, 522 U.S. 398, 403 (1998) ("it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy – even assuming that it is

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6. It is doubtful, moreover, that the premises underlying the Second Circuit's invocation of a presumption against preemption are valid. For example, it does not appear that nationally traded securities are properly considered "areas of traditional state regulation," *id.*, in light of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995), SLUSA, and the National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (1996) (codified in part at 15 U.S.C. § 77r), which preempted large swaths of state regulation in this area. *Cf. Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 111 (2d Cir. 2001) (these three statutes "considered in concert . . . demonstrate that Congress intended to provide national, uniform standards for the securities markets and nationally marketed securities.").

possible to identify that evil from something other than the text of the statute itself.").

To the extent that the Second Circuit's statement might be construed as a policy argument against a literal application of the statute, the statement is both dubious and irrelevant. It is dubious because requiring dismissal of the entire action will help to deter the filing of speculative SLUSA-preempted claims and is entirely consonant with the clear congressional purpose of eradicating abusive tactics and overreaching by the securities class action plaintiffs' bar. It is irrelevant because "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so." *Brogan*, 522 U.S. at 408. *See also Central Bank v. First Interstate Bank*, 511 U.S. 164, 188 (1994) ("policy considerations cannot override our interpretation of the text and structure of the Act, except to the extent that they may help to show that adherence to the text and structure would lead to a result so bizarre that Congress could not have intended it.") (citations and internal quotation marks omitted).

Finally, the Second Circuit attempted to buttress its conclusion by stating that "SLUSA's language and legislative history indicate no intent to preempt categories of state action that do not represent 'federal flight' litigation." *Dabit*, 395 F.3d at 47. As already discussed (and as the Second Circuit itself all but conceded), the statutory language is clear. As for the Second Circuit's insistence on legislative history to confirm what the statute clearly says: "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 (1980). *See also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386 n.2

(1992) ("[L]egislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning"); *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 125 S. Ct. 2611, 2625-27 (2005). Even if it were appropriate to consult legislative history, that history affirmatively supports an expansive reading of SLUSA. *See Rowinski*, 398 F.3d at 299 (legislative history indicates that Congress "envisioned a broad interpretation of SLUSA").

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully submit that the statutory language of SLUSA mandates that, when a complaint contains one or more SLUSA-preempted claims, the action must be dismissed in its entirety. Accordingly, the *amici curiae* urge the Court to reverse the judgment below on this basis or, in the alternative, to (1) specifically note the issue for further consideration by the lower courts, or (2) at least avoid any implicit endorsement of the Second Circuit's erroneous conclusion to the contrary.

Respectfully submitted,

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No. 04-1371

Supreme Court, U.S.
FILED
DEC 16 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Petitioner,

v.

SHADI DABIT, on behalf of himself and all others similarly situated,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF NATIONAL ASSOCIATION OF SHAREHOLDER AND CONSUMER ATTORNEYS AND AARP AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Shareholder and Consumer Attorneys ("NASCAT") is a nonprofit membership organization founded in 1989. The member law firms represent investors (both individuals and institutions) in securities fraud and shareholder derivative cases in federal and state courts throughout the United States. NASCAT and its members are devoted to representing victims of corporate abuse, fraudulent schemes, and so-called "white-collar" criminal activity in cases that have the potential for advancing the state of the law, educating the public, modifying corporate behavior, and improving access to justice and compensation for the wrongs inflicted upon victims. NASCAT advocates the principled interpretation and application of state and federal securities laws – including the Securities Act of 1933 (the "1933 Act"), Securities Exchange Act of 1934 ("1934 Act"), Private Securities Litigation Reform Act of 1995 (the "PSLRA"), Pub. L. No. 104-67, 109 Stat. 737 (1995) and Securities Litigation Uniform Standards Act ("SLUSA") – to protect investors from manipulative, deceptive and fraudulent practices and to ensure that the nation's securities markets operate fairly and efficiently.

AARP is a non-profit, non-partisan organization with more than 35 million members, dedicated to addressing the needs and interests of Americans aged 50 and older. As

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[1] Pursuant to Rule 37.6, counsel for NASCAT and AARP represent that they authored this brief in whole and that no person other than the *amici curiae*, their members or their counsel made a monetary contribution to the preparation or submission of the brief. Consent to the filing of *amici* briefs in support of either party was received by the Court from counsel for Respondent October 17, 2005 and from counsel for the Petitioner October 18, 2005.

the largest membership organization representing the interests of older Americans, AARP is very concerned about fraudulent practices in the securities industry. Older people are frequent targets of fraud because they often have significant assets and are looking for investment opportunities that will supplement the Social Security and pension benefits they hope to receive during retirement. As a result, AARP has made the need to combat securities fraud a high priority, and advocates the availability and enforcement of adequate federal and state statutory remedies to provide victims with financial redress.

NASCAT and AARP have regularly commented on legislative and regulatory proposals that address investment fraud, have filed *amicus curiae* briefs in cases involving interpretation of the federal securities laws, including *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627 (2005), *SEC v. Edwards*, 540 U.S. 389 (2004), and *SEC v. Zandford*, 535 U.S. 813 (2002), and have opposed efforts to limit federal statutory remedies that allow defrauded investors to obtain financial redress.

In this case, NASCAT and AARP believe that the Second Circuit correctly held that SLUSA does not preempt securities "holder claims" and that this Court's affirmance of that ruling will further the goal of protecting victims of investment fraud and help ensure that they can obtain recovery for their losses. A contrary ruling will foreclose most avenues of redress for many investors, particularly older persons, who tend to hold their investments for long-term appreciation and would not have viable purchase/sale claims under the 1933 Act, the 1934 Act and/or the PSLRA. These investors may sustain losses due to a scheme to defraud that have a significant impact on their retirement savings, yet are too small to justify the

expense of an individual lawsuit. They will have no recourse if this Court finds that SLUSA preempts state law class actions.

SUMMARY OF ARGUMENT

In this case the Second Circuit has most capably set forth why, as a matter of simple and straightforward statutory construction, the provisions of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. §§ 77p and 78bb(f), do not preempt state law based class actions that are brought on behalf of shareholders whose claims do not arise out of fraud in connection with the purchase or sale of a covered security. The Seventh Circuit's opaque and convoluted reasoning in *Kircher v. Putnam Funds Trust*, 403 F.3d 478 (7th Cir. Ill. 2005), *reh'g denied* (May 2, 2005), *petition for cert. filed*, (Sept. 29, 2005), stands in stark contrast: simply stated, *Kircher* stands the principles of statutory construction on their proverbial head. A comparison of these two recent circuit court opinions does more to advance Respondents' position than anything else.

Rather than attempt to repeat the already well-wrought rationale of the Second Circuit, in this *amici* brief NASCAT and AARP will first focus on an aspect that is essential to any determination of SLUSA preemption in this matter: What precisely is a "holder" claim? Before one can reach any conclusions about "holder" class actions and whether all or any should be preempted by SLUSA, there must be an understanding – a common ground – as to what precisely is the nature and legal basis of a true state law holder claim.

Without taking into consideration whether or not "holder" claims can be certified as a class action, either under Fed. R. Civ. P. 23 or its state law equivalent(s), or whether such claims brought as a class action might be subject to SLUSA preemption, the *bona fides* of such a claim, as a matter of common law, are manifest – as discussed below, they are straightforward common law fraud claims asserting that the frauds induced the continual holding of the subject security.

Most important, these are not Section 10(b) "purchaser" actions and thus, since this Court's decision in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), have clearly not been within the ambit of Section 10(b) of the 1934 Act. As set forth more fully below, the legal viability of such claims as individual actions and whether such claims should be allowed to proceed as class actions should be left to the state courts, particularly since such claims were not within Congress's collective mind – let alone an express subject of SLUSA. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981) ("in deciding if federal law preempts state law ... we start with the assumption that historic police powers of the state were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress").

I. Holder Claims Defined

Assume a shareholder purchased a stock January 1, 1994. Assume also that the issuing company first began engaging in fraudulent manipulation of its financial reporting February 1, 1994, and continued to do so until the truth became public January 3, 1997. The shareholder received, reviewed and relied upon each of the company's